No. _____

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In The
Supreme Court of the United States
October Term, 1993

VICTOR KRYNICKI, JR., M.D.,

Petitioner,

v.

UNITED STATES OF AMERICA,

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether due to the right of privacy the medical records of the Petitioner should be considered privileged from disclosure to the grand jury.

II. Whether, in light of reason, experience, and the privilege granted under the laws of the State of Illinois, the medical records of the Petitioner should be considered privileged from disclosure to the grand jury.

LIST OF PARTIES

The parties to this action are as follows:

The Petitioner is Victor Krynicki, Jr., M.D. Dr. Krynicki is a medical doctor whose address is 8 North Cass Avenue, Westmont, Illinois 60669.

Dr. Krynicki is represented by Ronald E. Stacker of the partnership of Stackler and Augustine, attorneys, which maintains offices at 200 W. Ohio Street, second floor, Chicago, Illinois 60610 and also at 218 N. Jefferson, Suite 202, Chicago, Illinois 60661.

The Respondent is the United States of America. The United States has been represented in these proceedings by Brian Blanchard, Assistant United States Attorney, Northern District of Illinois, 219 S. Dearborn, Chicago, Illinois 60604.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

JURISDICTIONAL STATEMENT 1

PROVISIONS INVOLVED IN CASE 3

STATEMENT OF CASE 3

A. Nature of Case 3

B. Statement of Facts 4

JURISDICTIONAL STATEMENT FOR FEDERAL JURISDICTION 6

REASONS FOR GRANTING WRIT 6

I. Medical Records of Patients Should Be Privileged 7

A. The Right of Privacy is Recognized 7

B. The Supreme Court Should Set A Standard For The Privacy of Medical Records 8

C. The Supreme Court Has The Authority To Find That Medical Records Are Privileged 10

II. The Court Should Recognize The Physician Patient Privilege Based on Comity, Reason and Experience 13

A. There Is A Conflict Between Various Federal Courts As To The Test To Be Used When A State Privilege Is Sought To Be Adopted Under Federal Common Law 13

B. The Seventh Circuit Should Have Recognized The Privilege Granted Patients by State Law 16

CONCLUSION 21

TABLE OF AUTHORITIES

Cases *Page*

Doe v. Boruough of Barrington, 729 F. Supp. 376, (D. N.J. 1990) 8, 9, 18

Doe v. City of Cleveland, 788 F. Supp 979, (N.D.Ohio, 1991) 9

In re Grand Jury Matters, 751 F.2d 13 (1st Cir. 1984) 10

In Re Grand Jury Subpoena: Subpoena Duces Tecum, 829 F.2d 1291 (4th Cir. 1987) U.S. cert. den. 110 S.Ct. 2618 ....19, 20

In Re Grand Jury Subpoena (Psychological Treatment Records), 710 F. Supp. 999, (D.N.J. 1989) 7, 9, 12, 16, 19

In Re Grand Jury Subpoena, 118 F.R.D. 558 (D. Vt. 1987) 14

In re Production of Records to the Grand Jury, 618 F. Supp. 440 (D. Mass. 1985) 14, 15, 16, 17, 18, 20

Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1964) 8

Jennings v. D.H.L. Airlines, 101 F.R.D. 549 (N.D. Ill. 1984) 11

People v. Bickham, 89 Ill.2d 1, 431 N.E.2d 365 (1982) 17

Sabree v. United Brotherhood of Carpenters and Joiner of America, Local No. 33, 126 F.R.D. 422 (D. Mass 1989) 11, 14, 15

In Re Search Warrant (Sealed), 810 F.2d 67, (3rd Cir. 1987) 7, 8, 13, 18

Shoemaker v. Handel, 608 F. Supp. 1151, (C.D.N.J. 1985) 9, 10

Trammel v. United States, 445 U.S. 40, 100 S. Ct. 906, 63 L.Ed.2d 186 (1980) 8, 10, 13, 17

Page

Whalen v. Roe, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977) 8, 18

In re Zuniga, 714 F.2d 632 (6th Cir. 1983) U.S. *cert. den.* 464 U.S. 983 104 S.Ct. 426, 78 L.Ed.2d 361 .....11, 14, 16

Federal Statutes

Title 28 U.S.C. § 2101(c) 2

Title 28 U.S.C. § 1331 .....1, 6

Title 28 U.S.C. § 1291 2

Title 42 U.S.C. § 12112(d) 3

State Statutes

Section 8-802 of the Illinois Code of Civil Procedure Ch. 110, par 8-802, Ill. Rev. Stat 3, 17

Federal Rules

Federal Rules of Criminal Procedure, Rule 17(c) 4

Federal Rules of Evidence, Rule 501 .....3, 4, 10, 13, 21

Proposed Federal Rules of Evidence, Rule 504; 120 Cong. Rec. 40891 (1974) 11

Other Authority

Ruebhausen and Brim, "Privacy and Behavioral Research," 65 Colum.L.Rev. 1184, (1960) 8, 12

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JURISDICTIONAL STATEMENT

This action arises under the laws of the United States. The United States grand jury sought to subpoena certain records from Dr. Krynicki. The jurisdiction of the District Court was based upon a federal question, as provided for under Title 28 U.S.C. 1331. The final decision appealed from the District Court to the Circuit Court of Appeals held Victor Krynicki, Jr., M.D., in contempt of the court's order of January 30, 1992. The order of January 30, 1992, denied Dr. Krynicki's motion to quash the grand jury subpoena. This decision was entered by the clerk of the District Court on May 15, 1992.

Dr. Krynicki appealed, as a matter of right, to the United States Court of Appeals for the Seventh Circuit, based upon

Title 28 U.S.C. 1291 in that Dr. Krynicki was appealing a final decision of the District Court. After briefs were filed the Seventh Circuit heard oral argument on the case on January 25, 1993. A decision by the Circuit Court, affirming the District Court was issued on August 20, 1993. No rehearing was sought on that decision.

Petitioner files this Petition for Writ of Certiorari pursuant to Title 8 U.S.C. par. 2101(c). This Petition is filed within 90 days of the decision of the United States Court of Appeals for the Seventh Circuit.

PROVISION INVOLVED IN CASE

FEDERAL RULES OF EVIDENCE

Rule 501. General Rule

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State or political subdivision thereof shall be determined in accordance with State law.

State statutes referred to in the text of the Petition are set out in the Appendix.

Title 42 U.S.C. par. 12112(d), which is referred to in the text of the Petition is also set out in the Appendix.

STATEMENT OF CASE

A. Nature of Case

This action is the result of a grand jury subpoena issued to Petitioner, Dr. Victor Krynicki, Jr., M.D., requiring him to produce certain medical records. Dr. Krynicki sought to quash the subpoena, but his motion to quash the subpoena was denied by Judge Moran, of the United States District Court for the Northern District of Illinois, Eastern Division, in an order dated January 30, 1992. Dr. Krynicki appeared before the grand jury but refused to produce the records. On May 15, 1992, based on the prior order of January 30, 1992, Judge Moran held Dr. Krynicki in contempt. Dr. Krynicki appealed from Judge Moran's order holding him in contempt in order to challenge the subpoena issued to him and the denial of his motion to quash. The appeal was filed with the United States Court of Appeals for the Seventh Circuit. The case was briefed and oral argument on the case was heard

on January 25, 1993. A decision by the Seventh Circuit, affirming the District Court, was issued on August 20, 1993.

B. Statement of Facts

The District Court entered orders in this case in response to motions filed by the parties. These motions were based upon certain facts, which were set forth in the motions and/or exhibits to the motions. Dr. Krynicki is a physician, licensed to practice medicine in the State of Illinois. Dr. Krynicki at one time practiced in Indiana, but moved to Illinois over 25 years ago. (Affidavit of Dr. Krynicki, p.1). A subpoena was issued to him dated November 14, 1992, which sought the production of medical records for over 120 patients[1] of Dr. Krynicki. This subpoena required Dr. Krynicki to produce:

> (1) any and all records of his medical practice relating to patients treated for weight loss who are named on an attachment to the subpoena; and
>
> (2) any and all records relating to all patients treated for weight loss who reside outside the State of Illinois. (Subpoena and attachments).

Dr. Krynicki was informed by some of his patients that they had been contacted by agents of the United States government regarding an investigation into their medical treatment and that they did not wish to have their records disclosed. (Affidavit of Dr. Krynicki, p. 2). On December 19, 1991, Dr. Krynicki moved to quash the subpoena, filing a motion, supporting memorandum and affidavit. (Motion to Quash Subpoena; Memorandum of Law in Support of Motion to Quash Subpoena; Affidavit of Dr. Krynicki).

The motion to quash relied upon both the Federal Rules of Criminal Procedure, Rule 17(c), and Rule 501 of the Federal Rules of Evidence. In addition, there was a challenge made to the scope of the subpoena in that it requested all records

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[1] An attachment to the subpoena named 120 patients and in addition the subpoena requested other records for patients who were not named. The exact number of patient records sought is undetermined at this time.

relating to all patients treated for weight loss who resided outside the State of Illinois. (Motion to Quash Subpoena; Memorandum of Law In Support of Motion to Quash Subpoena).

The supporting affidavit filed by Dr. Krynicki stated that the medical records were prepared in order to record information acquired in the course of attending patients. These records included a medical history from the patients that would set out information regarding habits (including use of drugs and alcohol), past medical problems, (including surgery, venereal disease) and birth control methods. (Affidavit of Dr. Krynicki, p. 1-2).

At a hearing conducted on December 27, 1991, Judge Moran indicated that he would only grant that part of the motion to quash which sought to limit the scope of the subpoena to a specific time frame for records relating to patients treated for weight loss who resided outside the State of Illinois. Judge Moran asked for the preparation of a draft order. (Transcript of proceeding held on December 27, 1991, p. 2-5). Dr. Krynicki sought to have Judge Moran certify the issue of whether the federal court should quash the subpoena under the facts of this case, but Judge Moran declined to certify the issue for immediate review. (Transcript of proceeding held on January 17, 1992). In an order entered on January 30, 1992, the court modified part of the subpoena, with the agreement of the United States, but denied the motion to quash. (Order of Chief Judge, dated January 30, 1992. Subsequently, on February 26, 1992, Dr. Krynicki appeared before the grand jury but refused to provide patient records based upon the confidentiality that he owed to his patients and the unreasonableness of requiring him to produce the records. (Exhibit C to Government's Motion for a Rule to Show Cause why Victor Krynicki Should Not be Held in Contempt).

After the appearance before the grand jury, the United States filed a Motion for a Rule to Show Cause seeking to have the court hold Dr. Krynicki in contempt for his failure to produce the records. (Government's Motion for a Rule to

Show Cause Why Victor Krynicki Should Not Be Held In Contempt). Dr. Krynicki filed a response to this Motion. (Response to Government's Motion for Rule to Show Cause). On May 15, 1992, the court entered an order containing a finding of contempt relating to a grand jury subpoena. (Minute Order of May 15, 1991).

Dr. Krynicki timely filed an appeal to the United Stated Court of Appeals for the Seventh Circuit. The issues in the case were fully briefed by the parties and the Seventh Circuit heard oral argument on the case on January 25, 1993. A decision by the Seventh Circuit, affirming the District Court was issued on August 20, 1993. The Seventh Circuit found that the subpoena was reasonable in that the information sought would reasonably produce information relevant to the grand jury's investigation and that the subpoena was not oppressive. Additionally the Seventh Circuit found that there was no recognized physician-patient privilege and that there was no compelling evidence or argument to create such a privilege.

JURISDICTIONAL STATEMENT FOR FEDERAL JURISDICTION

This action was originally filed in the Federal District Court because it arose under the laws of the United States. The United States grand jury sought to subpoena certain records of the Dr. Krynicki. Dr. Krynicki initially brought his motion to quash the subpoena in federal court. When Dr. Krynicki appeared before the federal grand jury, but refused to provide any medical records, the United States of America filed a motion seeking a finding of contempt with the federal court. The jurisdiction of the District Court was based upon a federal question, as provided for under Title 28 U.S.C. 1331.

REASONS FOR GRANTING THE WRIT

Petitioner, Victor Krynicki, Jr., M.D., prays that a Writ of Certiorari be issued in order for this Court to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above proceeding on August 20, 1993.

In support of this prayer, Petitioner states as follows:

I. Medical Records of Patients Should Be Privileged.

A. The Right of Privacy is Recognized.

This case should be accepted for review by this Court because it involves the important issue of the extent of the private sphere of individual liberty. At the foundation of the case are medical records disclosing information about treatment and habits of patients which was provided to their treating physician, Dr. Krynicki. Protection of such records is not only intertwined with the fabric of our law, it actually predates our Constitution. The traditions and ethical standards of physicians whereby physicians maintain their patient's secrets dates back to ancient times and is included as part of the Oath of Hippocrates. For many physicians, such as Dr. Krynicki, keeping a patient's medical records confidential is a matter of conscience.

Dating back to John Stuart Mill, in his essay entitled "On Liberty," there has been public discussion about an individual's sovereignty over his own body and the limit to the interference of the collective opinion with individual independence. Mill believed that to find the proper limit and maintain it is "as indispensable to a good condition of human affairs, as protection against political despotism." See Ruebhausen and Brim, "Privacy and Behavioral Research," 65 Colum.L.Rev. 1184, 1195 (1960).

The federal courts of the United States have also recognized a right to privacy. There is a recognized private sphere which will be kept largely beyond the reach of government. See *In re Search Warrant (Sealed)*, 810 F.2d 67, 71 (3rd. Cir. 1987). There is a constitutional right of personal privacy and one aspect of this right is the individual interest in avoiding disclosure of personal matters. *In Re Grand Jury Subpoena (Psychological Treatment Records)*, 710 F. Supp. 999, 1008, (D.N.J. 1989). The United States Supreme Court has also recognized a constitutional right of privacy and has made

specific reference to the confidential relationship between a doctor and his patients. See *Griswold v. Connecticut*, 381 U.S. 479, 481, 484, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1964). This privacy interest, as it relates to medical records, is rooted in the imperative need for confidence and trust between a patient and his doctor. *Trammel v. United States*, 445 U.S. 40, 51, 100 S. Ct. 906, 906, 63 L.Ed.2d 186 (1980). This Court has also spoken about the interest in avoiding disclosure of personal matters and the danger implicit in the accumulation of vast amounts of personal information in massive government files. *Whalen v. Roe*, 429 U.S. 589, 599, 605, 97 S.Ct. 869, 51 L.Ed.2d 186.

While the subject of the interaction between privacy and liberty has long been the subject of discussion, the law has been slow to recognize this right. See Ruebhausen and Brim, "Privacy and Behavioral Research," 65 Colum.L.Rev. 1184, 1186 (1960), quoting from Dean Roscoe Pound. This area of the law remains in evolution and the full extent of a patient's right of privacy in his or her medical records is largely undefined by this Court, particularly in relation to the privilege against disclosing private medical records in response to a grand jury subpoena.

B. The Supreme Court Should Set A Standard For The Privacy Of Medical Records.

While the Supreme Court has discussed the subject of privacy of medical records, it has been lower federal courts which have had, until now, the burden of applying these concepts to specific situations. One federal district court has interpreted the holding in *Whalen v. Roe* to lead to the conclusion that a person has a right of privacy in information about his medical conditions. *Doe v. Borough of Barrington*, 729 F. Supp. 376, 385 (D. N.J. 1990). Other federal courts have found that medical records, which contain intimate facts of a personal nature, are within the ambit of materials entitled to privacy protection. *In re Search Warrant (Sealed)*, 810 F.2d 67, 71 (3rd Cir. 1987).

Government coerced exposure of information disclosed by

patients in the context of a confidential therapeutic relationship implicates constitutionally protected areas of privacy. *In Re Grand Jury Subpoena (Psychological Treatment Records)*, 710 F. Supp. 999, 1006, (D.N.J. 1989). It has also been found by yet another lower federal court that there is a privacy interest in avoiding disclosure of personal medical information to the government or agents of the government and any intrusion in this area of privacy should be narrowly tailored. *Showmaker v. Handel*, 608 F. Supp. 1151, 1159 (C.D.N.J. 1985).

There are daily new advances in communications and technology. These advances may soon place all medical records in a computer bank and make them readily accessible by various means. If the Court will take judicial notice of a recent well publicized event, due to advances in communications there is the danger that once disclosed medical records may receive wide dissemination and publicity as has happened with the medical records of Arthur Ashe. The urgency and importance of the issue of the privacy of medical records is highlighted by the effect that disclosure of medical records may have upon a person's life. In the emotionally charged atmosphere in which we live, medical records contain information that if disclosed can change a person's life. Whether the medical records disclose a diagnosis of AIDS or a prior abortion, disclosure of this information can make a person a target of abuse and unwanted attention.

In *Doe v. Borough of Barrington*, 729 F. Supp. 376, 385 (D. N.J. 1990), the disclosure that a father had AIDS, led to a media event and the withdrawal of nineteen children from the school attended by the children in the famly. The court in *Doe v. City of Cleveland*, 788 F. Supp 979, 985 (N.D.Ohio, 1991), also found that the Constitution protected individuals from the disclosure of private medical information. Disclosure of such information can lead to harassment, discrimination and humiliation. In recognition of the prejudice and bias that may result from disclosure of medical records, the American With Disabilities Act seeks to limit questions about a person's medical history when he applies for a job. Title 42 U.S.C.

12112(d).

The case in which this Petition seeks the Court to grant a Writ of Certiorari raises the issue of what relationships and interests are entitled to a privilege from regulation, interference and/or disclosure. The patients, whose records are in issue, are not engaged in a heavily regulated business. Neither have they paraded their condition before the public by bringing an action for damages arising from their condition. Rather, Dr. Krynicki's patients are private citizens going about the usual day to day activities that most people engage in.

In *Shoemaker v. Handel*, 608 F. Supp. 1151, 1159 (C.D.N.J. 1985), the court found a privacy interest in avoiding disclosure of personal medical information. The court also found that this privacy interest was qualified and could be overcome where there was a compelling interest because the medical records involved people engaged in a regulated industry and because the disclosure was narrowly tailored. Those factors are not present in this case and it is the proper time for this Court to set a standard for determining the privacy of medical records and to determine what rights a private citizen has to prevent the government from viewing their medical records.

C. The Supreme Court Has The Authority To Find That Medical Records Are Privileged.

Courts considering whether a privilege should be extended are not limited to privileges granted in Congressional enactments, but may quash a grand jury subpoena even when no claim of privilege has been recognized. *In re Grand Jury Matters*, 751 F.2d at 17-18. Furthermore, the failure of common law to recognize a privilege in the past is not determinative of whether a privilege should be recognized under current circumstances. *In Re Grand Jury Subpoena (Psychological Treatment Records)*, 710 F. Supp. 999, 1004, (D.N.J. 1989) The door is open to change. See *Trammel v. United States*, 445 U.S. 40, 47, 100 S. Ct. 906, 910, 63 L.Ed.2d 186 (1980). Federal Rules of Evidence, Rule 501, provide that the law governing

the privileges of witnesses shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

This Court has already considered making certain medical records confidential. Proposed Federal Rule of Evidence 504, 120 Cong. Rec. 40891 (1974) which ultimately was not adopted by Congress, did propose a privilege for psychotherapist-patient privilege. Following the lead of proposed Rule 504, some lower federal courts have relied on their experience to extend a privilege for one aspect of the physician-patient relationship, a relationship dealing with mental health records. These courts have applied Rule 501 to find medical records dealing with mental health are confidential. *Jennings v. D.H.L. Airlines*, 101 F.R.D. 549, 551 (N.D. Ill. 1984); *Sabree v. United Brotherhood of Carpenters and Joiner of America, Local No. 33,* 126 F.R.D. 422, 425 (D. Mass. 1989); *In re Zuniga*, 714 F.2d 632, 639 (6th Cir. 1983) U.S. *cert.* den. 464 U.S. 983, 104 S.Ct. 426, 78 L.Ed.2d 361.

Since the laws of privilege protect records relating to mental health, it is reasonable to extend that same protection to similar types of medical records. As is true where mental health medical records are sought, the records in issue in this case do not concern patients being treated for the common cold. The subpoena issued to Dr. Krynicki specifically sought records relating to patients being treated for weight loss. People's relation to food is a complex phenomenon and can develop into an addiction, affected by various facets of a person's life. Emotional problems can effect a person's eating habits and overeating often is in response to an emotional problem. To some people the part of their lives dealing with weight loss is a very sensitive issue and treatment for this type of problem is more private than other forms of treatment.

Dr. Krynicki recognizes the complexity of humans and their relations to diet. He takes a full medical history from his patients, including information about their use of drugs/alcohol and past medical problems. Patients will only provide this type of information if they have trust and faith in their

physicians and are assured that this information will not be disclosed.

There has been criticism, as an oversimplification, of distinctions drawn between mental health records and other forms of medical records. See *In Re Grand Jury Subpoena (Psychological Treatment Records)*, 710 F. Supp. 999, 1007. (D.N.J. 1989). Courts should not have to make a difficult medical decision in order to distinguish between psychotherapist records and those medical records that may be related to emotional problems. Dr. Krynicki is requesting that this Court extend decisions that recognize a psychotherapist-patient privilege to include the medical records sought under a subpoena requesting records that relate to treatment for weight loss.

> The Claim to privacy will always be embattled — its collision with the community's need to know is classic and continuous . . . The degree of privacy granted throughout history to an individual by one or another community has varied markedly with the nature of the political system, the economic level, the population density and the characteristics of the environment.

Ruebhausen and Brim, "Privacy and Behavioral Research," 65 Colum.L.Rev. 1184, 1190 (1960).

There is currently a hysteria concerning the spread of AIDS. There is also an active movement to discourage people from seeking abortions, which uses confrontation as a method to discourage abortions. Given the recent developments in this county it is proper for this Court to consider the collision of the community's need to know and the private citizen's right to privacy in his or her medical records. This court should determine how the federal common law will evolve to address those issues. This process is the classic functions of the law. Ruebhausen and Brim, "Privacy and Behavioral Research," 65 Colum.L.Rev. 1184, 1186 (1960).

Even in cases which lower courts have held that medical

records can be disclosed, the courts have described the process of making the decision as a delicate balance between the individual privacy interest in the patient's medical records against the legitimate interest of the government in securing the information contained therein. *In re Search Warrant (Sealed)*, 810 F.2d 67, 69 (3rd Cir. 1987). At this time in our history, this court should give further guidance to federal courts in how to make that delicate balance. Because these rights and values are currently confronting each other, not only in this case but throughout our country, this Court should grant this Petition for a Writ of Certiorari in order to consider the crucial issue of privacy. After a thorough review of the issues it is anticipated that the Court will hold that Dr. Krynicki's records are privileged and reverse the lower court, which held Dr. Krynicki in contempt. However, regardless of the ultimate outcome, this Court should grant the Petition for Writ of Certiorari for the purpose of giving direction to the lower courts as to how they should weigh the respective interests and whether right of privacy should be extended to grant a privilege to medical records under federal common law.

II. The Court Should Recognize The Physician-Patient Privilege Based On Comity, Reason and Experience.

A. There Is A Conflict Between Various Federal Courts As To The Test To Be Used When A State Privilege Is Sought To Be Adopted Under Federal Common Law.

This case should be accepted for review by this Court so that it may establish a definitive test for lower courts to apply in determining when to adopt a privilege, granted under state law, as a privilege under federal common law. The law of privilege is an evolutionary process, to be developed on a case-by-case basis. See *Trammel v. United States*, 445 U.S. 40, 47, 100 S. Ct. 906, 910, 63 L.Ed.2d 186 (1980). Federal Rules of Evidence, Rule 501, provides that the law governing the privileges of witnesses shall be governed by the principles

of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. The federal courts should not automatically reject a privilege merely because it is not explicitly enacted. In *re Zuniga*, 714 F. 2d 632 (6th Cir. 1983) U.S. *cert.* den. 464 U.S. 983, 104 S.Ct. 426, 78 L.Ed.2d 361.

One factor in the broad term experience is the experience of the states of the union. The experience of a state government should be considered under the principle of comity. This Court is the final authority as to how much weight should be given to comity in the application of Rule 501.

Lower courts have applied this rule in different mammers and applied different analysis to this question. In this case, which was decided in the Seventh Circuit, the court chose to completely disregard the recognition of a privilege under Illinois law, based upon the federal government's interest in enforcing federal criminal statutes. Other federal courts are commited to comity and consider the state law privilege. These court do not automatically reject such privileges. *Sabree v. United Brotherhood of Carpenters and Joiner of America, Local No.33*, 126 F.R.D. 422, 424-425 (D. Mass. 1989). Under the discretion granted to the federal courts by Rule 501 a federal court can rely upon reason and experience and thereby recognize a privilege which is applied under state law. See *In re Grand Jury Subpoena*, 118 F.R.D. 558, 561 (D. Vt. 1987).

In developing the federal common law of privilege, the courts should balance both the federal and state interest involved. This view is supported by the principle of comity, whereby federal courts should recognize state evidentiary privileges where this can be accomplished at no substantial cost to federal substantive and procedural policy. *In re Production of Records to the Grand Jury*, 618 F. Supp. 440, 443 (D. Mass. 1985).

To date it has been the federal district courts and federal courts of appeal which have set the analytical framework for balancing the differing state and federal interest in such

a case. There is a conflict between these various federal courts as to which test or framework to apply when a state enacted privilege is sought to be adopted into the federal common law.

One type of framework was set out in the case of *In re Production of Records to the Grand Jury*, 618 F. Supp. 440, 443 (D. Mass, 1985). In this case the Massachusetts Department of Social Services claimed a privilege against the disclosure of information based upon a state statute protecting communication to a social worker. The United States sought a court order from the federal court to compel production of the records and the court denied the United States' petition. In reaching this conclusion the Court considered four factors:

1. Would the courts of the state recognize such a privilege?
2. Is the state's asserted privilege "intrinsically meritorious" in our independent judgement?
3. Should such a privileged relationship be sedulously fostered?
4. Is the injury that would inure to the relation by the disclosure of the communication greater than benefit thereby gained?

After reviewing this anlytical framework the court granted a qualified privilege against disclosure of communications to a social worker, which was the privilege established by Massachusetts statutes.

A completely different framework was used by the Seventh Circuit in this case. The Seventh Circuit merely considered the balancing of federal interest in obtaining medical records against the express wishes of the patients to keep their records confidential. This same limited test has been used by other federal courts. *Sabree v. United Brotherhood of Carpenters and Joiner of America, Local No. 33*, 126 F.R.D. 442, 425, (D. Mass 1989). The circuits which take this limited approach, as demonstrated by the opinion issued by the Seventh Circuit in this case, completely ignore comity with the states. If community consensus of a state, expressed through the democratic process involving the legislative and

executive branch, results in the enactment of a physician-patient privilege, this is in itself a compelling interest for the federal court to recognize such a privilege. The enactment by the state of physician-patient privilege shows that the citizens of that state expect privacy of their medical records.

Some courts, based upon their framework or mode of analysis, have found that there is a patient-psychotherapist privilege, even in the context of a grand jury proceeding. *In Re Grand Jury Subpoena (Psychological Treatment Record)*, 710 F. Supp. 999, 1008, (D.N.J. 1989); *In re Zuniga*, 714 F.2d 632, 639 (6th Cir. 1983) U.S. *cert.* den. 464 U.S 983 104 S.Ct. 426, 78 L.Ed.2d 361. Courts that have found that such a privilege exists have distinguished other cases by asserting that other federal courts used an inappropriate mode of analysis. *In Re Grand Jury Subpoena (Psychological Treatment Records)*, 710 F. Supp. 999, 1011-1012 (D.N.J. 1989).

It is proper for such an important issue, involving the relation between the federal goverment and the state governments, to be considered at the highest level of the judicial branch, the United States Supreme Court. This Court should grant the Petition for a Writ of Certiorari in order to resolve this dispute between the courts of the United States and set a single mode of analysis to be used when there is an issue of comity between the state and federal sovereignties regarding a privilege against disclosing information.

B. The Seventh Circuit Should have Recognized The Privilege Granted Patients by State Law.

Dr. Krynicki contends that had the Seventh Circuit followed the same analytical framework as used in the case of *In re Production of Records of the Grand Jury*, it would have held that the Illinois privilege granted to patients for information provided to their physician should be recognized under the federal common law.

Under the first factor listed in the case of *In re Production of Records to the Grand Jury*, Illinois, where Dr. Krynicki

currently practices, the physician-patient relationship is confidential and the medical records of the patient are privileged. The State of Illinois has clearly established a statutory privilege prohibiting a physician from disclosing information about a patient. Section 8-802 of the Illinois Code Civil Procedure, Ch. 110, par 8-802, Ill. Rev. Stat., states:

> No physician or surgeon shall be permitted to disclose any information he or she may have aquired in attending any patient in a professional character, necessary to enable him or her professionally to serve the patient. . . . Ill.Rev.Stat., 1989, ch 110, Section 8-802.[2]

This privilege applies even in the context of a state grand jury investigating the treatments of patients. See *People v. Bickham*, 89 Ill. 2d 1, 431 N.E.2d 365 (1982). In this case, under the factors used in the case of *In re Production of Records to the Grand Jury*, the first factor would be answered yes.

Illinois' reverence and concern for privacy, in the medical context, is not an aberration. This concern for privacy has been recognized by this Court and other federal courts and has been recognized by the profession of medicine for centuries. Furthermore, when a patient has expressly told his doctor that he does not want disclosure of his medical records, it would be embarrasing, harmful and depressing for the records to be disclosed.

Patients are not concerned with distinctions between state and federal privileges, they believe that they have the right to privacy and that what they tell their physician is confidential. As is true for most people, Dr. Krynicki's patients do not want information about their medical problems to be disclosed, against their wishes, to anyone. The privacy interest, as it relates to the medical records, has intrinsic merit and there is an imperative need for confidence and trust between a patient and his doctor. This need has been recognized by this Court in *Trammel v. United States*, 445 U.S.

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[2] The limited exceptions set out in this statute are not relevant to this case.

40, 51, 100 S. Ct. 906, 63 L.Ed.2d 186 (1980). Patients who have specifically sought to invoke the confidentiality of their medical records will not be comforted by the fact that it was members of a federal grand jury sitting in Illinois, rather than a state grand jury, who obtained intimate facts about their medical histories and treatment. In this case, under the factors used in the case of *In re Production of Records to the Grand Jury*, the second factor would be answered yes, the asserted privilege is "intrinsically meritorious."

The Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of goverment. Among the areas within this private sphere is information about a person's medical condition. *In Re Search Warrant (Sealed)*, 810 F.2d 67, 71 (3rd Cir. 1987). This constitutional right to privacy extends to the individual interest in avoiding disclosure of personal matter. *Whalen v. Roe*, 429 U.S. 589, 599, 97 S.Ct. 869, 876, 51 L.Ed.2d 64 (1977).

The right of privacy in relation to the medical information is recognized under the law based upon our inherent belief that this is a matter beyond the scope of public or governmental intrusion. This inherent belief is confirmed by the results of disclosure of such information. See *Doe v. Borough of Barrington*, 729 F. Supp. 376, 385 (D. N.J. 1990). The United States has, based upon the uncontested statements in Dr. Krynicki's affidavit, been in contact with the patients and could have sought the patients' consent for disclosure of their records. Where no such consent has been placed in the record, the Court should protect the privacy of the patients to the full extent permitted by law. In this case, under the factors used in the case of *In re Production of Records to the Grand Jury*, the third factor would be answered yes, the asserted privilege should be sedulously fostered.

The final factor applied in the case of *In re Production of Records to the Grand Jury* is whether the injury that would inure to the relation by the disclosure of the communication is greater than the benefit thereby gained. In regard to the injury that might inure, if the medical records were *not*

disclosed, one federal court has found that it is not at all certain that recognition of a privilege for psychotherapy records would impair many grand jury investigations. *In Re Grand Jury Subpoena (Psycological Treatment Records)*, 710 F. Supp. 999, 1008, (D.N.J. 1989). As to the specific impairment of the grand jury fuction by recognizing a privilege to medical records in this case, this Court is left to speculation.

The record of proceedings in this case, show that the United States did not file any affidavit to set out the specific facts that required the production of the medical records sought from Dr. Krynicki. The reliance of the goverment was on the general proposition that the grand jury has a right to every person's evidence. While this general statement may be true as a broad general statement, it must be considered in the context that this was a federal grand jury and as such was limited to investigations of violations of federal law. Dr. Krynicki's practice of medicine would be the subject of state regulation and the federal government would presumably only be concerned with the prescription of medications that are subject to federal statutes. No billing records were sought and it appears that there is no issue regarding mail fraud or other fraudulent actions seeking payment. Furthermore, the grand jury did not subpoena the patients to obtain their evidence, but subpoenaed their physician to obtain information about them and their medical conditions. This personal information is sought, even though the patients were not identified as subjects of the investigation.

The subpoena which was challenged by Dr. Krynicki and which he seeks to have this Court consider, was a subpoena for all parts of patient's medical records. No attempt has been made to minimize the impact of disclosure on the patient's confidentiality, by limiting the subpoena to those aspects of the records which would relate to the subject of the inquiry by the grand jury. For example, if the grand jury is looking at prescription practices, the subpoena should be limited to those portions of the records indicating what medication(s) were prescribed. While this type of inquiry would still involve an invasion of privacy, at least it would not disclose the full

medical history of the patient.

It is appropriate, whether in the context of a criminal case or in a grand jury investigation, that a subpoena should not be an unlimited fishing expedition. *In Re Grand Jury Subpoena: Subpoena Duces Tecum*, 829 F.2d 1291, 1301-1302 fn. 14 (4th Cir. 1987) U.S. *cert.* den. 110 S.Ct. 2618. There has not been any showing by the government of a need for the entire record, and therefore, no showing of what benefit would be gained if the patient's right of privacy is ignored. In this case, under the factors used in the case of *In re Production of Records to the Grand Jury*, the fourth factor would be answered yes, the injury that would inure to the relation by the disclosure of the communication is greater than the benefit thereby gained.

Since the four factors applied in this case, under the factors used in the case of *In re Production of Records to the Grand Jury*, would have been answered yes if that framework would have been used by the Seventh Circuit, Dr. Krynicki's records should have been deemed privileged. This is especially true due to the lack of any factual showing by the United States of their need for the full medical records of the patients. Dr. Krynicki contends that if this case were analyzed in the proper framework, the subpoena should be quashed to protect the patients from all but the least obtrusive disclosure that will serve the purposes of the grand jury. This Court should reverse the finding of contempt. *In Re Grand Jury Subpoena: Subpoena Duces Tecum*, 829 F.2d 1291, 1293 (4th Cir. 1987) U.S. *cert.* den. 110 S. Ct. 2618. At a minimum, this Court should grant the Petition for a Writ of Certiorari to consider this case in light of the factors used in the case of *In re Production of Records to the Grand Jury*.

CONCLUSION

The issue before this Court is not an issue of federal supremacy. Instead the issue is whether in light of experience, including the experience of the State of Illinois, the federal courts should apply Rule 501 to recognize a physician-patient privilege under the facts of this case. The federal government is supreme, but under the rights of privacy and/or the principles of comity, the federal courts can adopt a privilege that makes sense. This court should grant this Petition for a Writ of Certiorari to determine whether Dr. Krynicki's patients have a right of privacy for the medical records that should be protected by a privilege. In the alternative, this Court should grant this Petition for Writ of Certiorari to resolve a conflict and establish a test for lower courts to guide these courts as to when, based upon comity, reason and experience, they should adopt a state granted privilege as part of the federal common law.

Respectfully submitted,

Victor Krynicki, Jr., M.D.
Petitioner

by, Ronald E. Stackler
Stackler and Agustine

Ronald E. Stackler
STACKLER & AUGUSTINE
218 North Jefferson Street
Suite 202
Chicago, Illinois 60661

APPENDIX

Title 42 U.S.C. par 12112 (d)

(d) Medical examinations and inquiries. (1) In general. The prohibition against discrimination as referred to in subsection (a) shall include medical examinations and inquiries.

(2) Preemployment. (A) Prohibited examination or inquiry. Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry. A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment entrance examination. A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if—

(A) all entering employees are subject to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that—

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this Act shall be provided relevant information on request; and

(C) the results of such examinations are used only in accordance with this title.

(4) Examination and inquiry. (A) Prohibited examinations and inquiries. A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries. A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) Requirement. Information obtained under subparagraph

(B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

ILLINOIS REVISED STATUTES, CHAPTER 110

§ 8-802. Physician and patient. No physician or surgeon shall be permitted to disclose any information he or she may have acquired in attending any patient in a professional character, necessary to enable him or her professionally to serve the patient, except only (1) in trials for homicide when the disclosure relates directly to the fact or immediate circumstances of the homicide, (2) in actions, civil or criminal, against the physician for malpractice, (3) with the expressed consent of the patient, or in case of his or her death or disability, of his or her personal representative or other person authorized to sue for personal injury or of the beneficiary of an insurance policy on his or her life, health, or physical condition, (4) in all actions brought by or against the patient, his or her personal representative, a beneficiary under a policy of insurance, or the executor or administrator of his or her estate wherein the patient's physical or mental condition is an issue, (5) upon an issue as to the validity of a document as a will of the patient, (6) in any criminal action where the charge is either first degree murder by abortion, attempted abortion or abortion, (7) in actions, civil or criminal, arising from the filing of a report in compliance with the Abused and Neglected Child Reporting Act, (8) to any department, agency, institution or facility which has custody of the patient pursuant to State statute or any court order of commitment, (9) in prosecutions where written results of blood alcohol tests are admissible pursuant to Section 11-501.4 of the Illinois Vehicle Code or (10) in prosecutions where written results of blood alcohol tests are admissible under Section 5-11a of the Boat Registration and Safety Act.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

IN RE: Subpoena to Testify
Before Grand Jury
Issued 11/13/91
To Dr. Victor F. Krynicki Jr.

91 GJ 1103

RECEIVED
JAN 30 1992
JAMES B. MORAN
U.S. DISTRICT COURT
CHIEF JUDGE

ORDER OF CHIEF JUDGE

THIS MATTER coming to be heard on Respondent's Motion to Quash Subpoena

IT IS HEREBY ORDERED:

1. As to the production of records for all patients who reside outside of Illinois, the subpoena is modified by the United States Attorney, with leave of court, to provide for the production of patient records of patients treated for weight loss since January 1, 1986, and who resided outside of the State of Illinois during that period of their treatment.

2. As to the patient records of the patients names on the attachment to the subpoena, the subpoena provides for the production of all patient records of these patients, without regard to when these patients were treated.

3. The Motion to Quash the subpoena, is denied based upon the Supremacy clause of the United States Consitution. This order is entered and the documents sought are to be produced at the command of the grand jury and over the objections of Respondent as set forth in the Motion to Quash.

ENTER:

DATED: 1/30/92

JAMES B. MORAN

Chief Judge

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge or Magistrate Judge James B. Moran

Case Number **81 GJ 1103**

Case Title A MATTER BEFORE A GRAND JURY

MOTION: The following indicates the party filing the motion e.g., plaintiff, defendant, 3rd-party plaintiff, and (b) state briefly the nature of the motion being presented.

FRED FOREMAN, United States Attorney

By: BRIAN W. BLANCHARD, Assistant United States Attorney

GOVERNMENT'S MOTION FOR A RULE TO SHOW CAUSE

[X] In camera hearing held on Government's motion. Motion granted. Dr. Victor Krynizki found in contempt of court's order to comply with grand jury subpoena. Fine of $100/day until Krynicki complies with subpoena.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

JUDGEMENT - WITH ORAL ARGUMENT

Date: August 20, 1993

BEFORE: Honorable Walter J. Cummings, Circuit Judge
Honorable Ilana Diamond Rovner, Circuit Judge
Honorable Thomas E. Fairchild, Senior Circuit Judge

No. 92-2227

IN THE MATTER OF GRAND JURY PROCEEDINGS,

APPEAL OF: DR. VICTOR KRYNICKI

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 91 GJ 1103, James B. Moran, Chief Judge

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

On consideration whereof, **IT IS ORDERED AND ADJUDGED** by this court that the judgment of the District Court is AFFIRMED, in accordance with the decision of this court entered this date.

(1061-051993)

United States Court of Appeals

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604
Argued January 25, 1993

Decided August 20, 1993

Before

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 53

Honorable Walter J. Cummings, Circuit Judge
Honorable Ilana Diamond Rovner, Circuit Judge
Honorable Thomas E. Fairchild, Senior Circuit Judge

No. 92-2227

IN THE MATTER OF GRAND JURY PROCEEDINGS:
VICTOR KRYNICKI,
Respondent-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 91 GJ 1103

James B. Moran, Chief Judge

ORDER

Dr. Victor Krynicki appeals from a contempt order issued by the district court for failure to comply with a grand jury subpoena duces tecum. Because the district court properly upheld the subpoena, we affirm the court's order of contempt.

I.

On November 13, 1991, the district court issued a grand jury subpoena requiring Krynicki to produce medical records of 120 named Illinois residents whom he had treated for weight loss and all non-Illinois residents whom he had so treated. On December 27, Krynicki moved to quash the subpoena under

Fed. R. Civ. P. 17(c) and Fed. R. Evid. 501. Krynicki argued that the subpeona was unreasonable and oppressive in that it interfered with the privacy rights of patients, violated the physician-patient relationship, required him to violate the physician-patient privilege set out in Ill. Rev. Stat. ch. 110, ¶ 8-802 so as to put him at risk of civil liability or license revocation, and, for all these reasons, jeopardized his practice. Krynicki asked the court to apply the state law privilege under Fed. R. Evid. 501 because, although the subpoena related to a federal investigation, Krynicki practices in Illinois. As for that portion of the subpoena aimed at the records of non-Illinois residents, Krynicki objected to its scope. He argued that it was overbroad in not being time-limited and vague in not indicating what if any nexus was to exist between treatment and non-Illinois residence.

After two in camera hearings on December 27, 1991 and January 17, 1992, the district court denied Krynicki's motion to quash in a January 30, 1992 order. The court found that under the Supremacy Clause of the United States Constitution, a federal grand jury was not bound by the state law privilege and legal action against Krynicki would be barred. The court also reasoned that grand jury secrecy requirements would suffice to protect patient confidentiality. The court modified the portion of the subpoena relating to non-Illinois residents so as to require only records of those patients "treated for weight loss since January 1, 1986, and who resided outside of the State of Illinois during that period of their treatment." When Krynicki continued to ignore the subpoena, the district court entered an order of contempt on May 15, 1992, and imposed a penalty of $100 per day of non-compliance. Krynicki appealed from that order.[1]

II.

Civil contempt is a proper sanction for failure to comply with a subpoena duces tecum, and such an order is final and appealable. *United States v. Ryan*, 402 U.S. 530, 532 (1971); *In re Klein*, 776 F.2d 628, 630 (7th Cir. 1985). We will reverse

[1] We subsequently granted Krynicki's motion to stay imposition of the fine pending appeal.

an order of contempt only if the district court abused its discretion or its decision was clearly erroneous. *Laborers' Pension Fund v. Dirty Work Unlimited, Inc.*, 919 F.2d 491, 494 (7th Cir. 1990); *In re John Doe Trader Number One*, 894 F.2d 240, 242 (7th Cir. 1990). Thus, "the relevant inquiry is not how the reviewing judges would have ruled . . . but rather, whether any reasonable person could agree with the district court." *United States v. Ashman*, 979 F.2d 469, 495 (7th Cir. 1992)(quoting *United States v. Valona*, 834 F.2d 1334, 1341 (7th Cir. 1987)). Under that standard, Krynicki's arguments fail and we must uphold the district court's order.

A. Fed. R. Crim. P. 17(c)

Krynicki first argues that the subpoena should have been either quashed or modified under Fed. R. Crim. P. 17(c), which applies to subpoenas duces tecum and provides in relevant part:

> The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive.

As the party seeking to quash the subpoena pursuant to Rule 17(c), Krynicki bears the burdern of establishing that "compliance would be unreasonable or oppressive." *United States v. R. Enterprises, Inc.*, 111 S. Ct. 722, 728 (1991).

In *R. Enterprises*, the Supreme Court explored the unreasonableness component of Rule 17(c) in the grand jury context. *Id.* The Court noted that in the pre-trial context, parties are limited by the Rule 17(c) reasonableness requirement to seeking information that will be both relevant and admissible at trial. *Id.* at 727 (citing *United States v. Nixon*, 418 U.S. 683, 700 (1974)). In the grand jury context, where the inquiry is much broader and charging decisions generally only follow from the grand jury's investigation, such a determination is not yet possible. *Id.* Thus, a grand jury subpoena is not unreasonable if there is "a reasonable possibility that the . . . records . . . would produce information relevant to the grand jury's investigation. . . ." *Id.* at 729. The Court's discussion in *R. Enterprises* therefore makes clear that reasonableness relates only to the potential

relevance of the information sought, and not to the burden the subpoena might impose on a witness.[2] Because Krynicki has not challenged the potential relevance of the requested information, then, he has not actually challenged the reasonableness of the subpoena.

Instead, Krynicki's arguments all focus on the subpoena's oppressiveness. In reviewing those arguments we remain mindful that the district court possesses broad discretion in determining whether a subpoena conforms with Rule 17(c). *In re Klein*, 776 F.2d at 635 ("district courts possess considerable discretion in deciding whether subpoenas are vague, broad, or oppressive.") As the Supreme Court explained in *Nixon*, 418 U.S. at 702, "[w]ithout a determination of arbitrariness or that the trial court finding was without record support, an appellate court will not ordinarily disturb a finding that the applicant for a subpoena complied with Rule 17(c)." A brief review of Krynicki's arguments makes clear that the district court did not abuse its discretion in finding that the subpoena was not oppressive.

First, Krynicki argues that the subpoena is oppressive because it requires him to violate the state law privilege. He asserts that disclosure of the records puts him at risk of adverse legal action by either the State of Illinois or his patients. Specifically, he suggests that the state could revoke his medical license for violating his patients' confidentiality and that patients would have a cause of action based on his violation of the privilege. This argument is completely without merit. As the district court correctly noted, the fact that Krynicki

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[2] The dissent maintained that the two components could not be analyzed separately, but need always be considered in relation to one another. It thus reasoned that Rule 17(c):

> requires the district court to balance the burden of compliance, on the one hand, against the governmental interest in obtaining the documents on the other. A more burdensome subpoena should be justified by a somewhat higher degree of probable relevance than a subpoena that imposes a minimal or nonexistent burden.

111 S. Ct. at 729 (Stevens J., dissenting)(citations omitted).

is responding to a federal court order would protect him from any legal action that might result from his compliance with the subpoena. (Dec. 27 Hearing Tr. at 4.) The Supremacy Clause of the United States Constitution renders state law without effect in the context of a federal grand jury investigation and would bar any state law causes of action against Krynicki. *Memorial Hosp. for McHenry County v. Shadur*, 664 F.2d 1058, 1063-64 (7th Cir. 1981).[3]

Krynicki also contends that the subpoena is oppressive in that it violates his patients' privacy rights. The district court rejected this argument, reasoning that the grand jury's secrecy requirements would sufficiently protect patients' privacy interests. (Dec. 27 Hearing Tr. at 2-3; May 15 Hearing Tr. at 3.) Although disclosure of medical records may in some instances burden patients' privacy interests, the district court did not clearly err or abuse its discretion in determining that the confidentiality of the grand jury process sufficiently offset that concern in this instance.

Krynicki also contends that his compliance with the subpoena will anger his patients and, for that reason, harm his reputation and his practice. He points to the fact that several of his patients were contacted regarding the investigation and subsequently informed him that they did not wish to have their records disclosed. But the fact that investigators may have informed Krynicki's patients of the investigation and in that way potentially harmed his reputation is unrelated to the subpoena itself. Because patients learned of the investigation only in this way and otherwise had no way to know of the subpoena, the subpoena itself is not responsible for any harm to Krynicki's reputation.

Finally, Krynicki argues that the subpoena is overbroad in that it (1) seeks patients' entire records rather than focusing on portions relevant to the investigation and (2) does not require deletion of patient names or otherwise protect their

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[3] Whether federal courts should recognize the privilege—which belongs to the patients and not to Krynicki (Glen Weissenberger, *Federal Evidence* § 501.8 at 174 (1987))—is a separate question, which is discussed below.

confidentiality. This argument has some merit in that unnecessary intrusion into confidential medical records should be avoided, and patient names, at the very least, do not appear relevant to the grand jury's investigation. But because Krynicki did not request this type of modification below, he has waived this argument and it has no bearing on our review of the district court's order of contempt.

Krynicki therefore failed to establish that the subpoena was oppressive, and the district court did not err in refusing to quash it pursuant to Rule 17(c).

B. Fed. R. Evid. 501

Fed. R. Evid. 501 provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State or political subdivision thereof shall be determined in accordance with State law.

Thus, under Rule 501, we are not bound by state law privileges, but must determine for ourselves "in the light of reason and experience" whether to recognize a privilege. *United States v. Wilson*, 960 F.2d 48, 50 (7th Cir.), *cert. denied*, 113 S. Ct. 275 (1992). In making that determination, we balance the interest that would be protected by recognizing the privilege against the federal interest in gaining access to the information that would be protected. *Id.*

As for the government's interest in disclosure of the information, we explained in *Wilson*:

> The federal government has a strong interest in enforcing federal criminal statutes, which implies a strong policy favoring admissibility of relevant evidence in criminal cases. Related to this is the federal courts' general interest in preserving the accuracy of the fact-finding process. Because evidentiary privileges impede the fact-finding function by excluding relevant evidence, federal courts generally disfavor privileges and construe them narrowly.

960 F.2d at 50 (citations omitted).

Krynicki has conceded, both in his brief and at oral argument (Krynicki Brief at 18-22), that federal courts have never recognized a physician-patient privilege. Instead, by his own characterization, he is asking us to go beyond existing case law to recognize the privilege in this case. Yet Krynicki has failed to offer any compelling evidence or arguments to support his position. Indeed, his failure to request that the district court require the redaction of patient names casts doubt on his ability to adequately represent his patients' interests (which the privilege is meant to protect) in this matter. In light of the government's compelling interest in investigating possible criminal activity, the court did not abuse its discretion by following existing law rather than creating a new privilege when no persuasive reasons for doing so were offered.

III.

The district court did not abuse its discertion in upholding the grand jury subpoena or in entering an order of contempt when Krynicki refused to comply with the subpoena. We therefore affirm.